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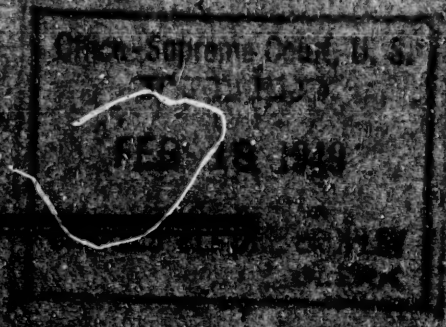


No. 909

# In the Supreme Court of the United States

October Term, 1948

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United States of America, Ex Rel.
[illegible] Johnson, Petitioner

v.

[illegible] Watkins, District Director of the Immigration and Naturalization Service in the New York District, or Such Other Person as May Have the Custody of Mary Johnson

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On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 506

UNITED STATES OF AMERICA, EX REL. MAY JOHNSON, *Petitioner*

v.

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or Such Other Person, If Any, Who May Have the Custody of May Johnson

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**On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit**

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 51-60) have not yet been reported. The opinion of the district court on reargument (R. 41-45) has not been reported.

## JURISDICTION

The judgment of the Court of Appeals was entered November 29, 1948 (R. 61). The petition for a writ of certiorari was filed January 12, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in an exclusion proceeding, the medical certificate of a board of medical officers, to the effect that petitioner was a "Mental Defective, Class A," and so excludable, was conclusive as to the medical finding upon the board of special inquiry.

2. Whether the medical certificate, concurred in by the board of medical officers on petitioner's appeal, on which was based the exclusion order of the board of special inquiry, complied with the applicable regulations.

3. Whether the Administrative Procedure Act is applicable to exclusion proceedings in respect of the composition of the board of special inquiry, the continuity of its membership during the proceedings, and the separation of the investigative and decision making functions.

## STATUTES AND REGULATIONS INVOLVED

Sections 16 and 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 885, 887, as

amended, 8 U. S. C. 152, 153, provide in pertinent part:

> SEC. 16. The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien; * * *. All aliens arriving at ports of the United States shall be examined by not less than two such medical officers at the discretion of the Attorney General, and under such administrative regulations as he may prescribe and under medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical officers of the United States Public Health Service who have had especial training in the diagnosis of insanity and mental defects, shall be detailed for duty or employed at all ports of entry designated by the Attorney General, * * * Any alien certified for insanity or mental defect may appeal to the board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and said alien may introduce before such board one expert medical witness at his own cost and expense. * * *

Sec. 17. Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land * * *. * * * The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected with * * * any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States * * *

Sections 5, 7 and 11 of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 239, 241, 244, 5 U. S. C. 1004, 1006, 1010, provide in pertinent part:

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved

* * * (3) proceedings in which decisions rest solely on inspection, tests, or elections; * * *

* * * * * * * *

(c) Separation of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses * * *

* * * * * * * *

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2)

one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.

* * * * * * * *

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, * * *.

Section 60.29 of Title 8, Alien and Nationality, of the Code of Federal Regulations (Supp. 1947) provides for the designation of the following persons as eligible to serve on boards of special inquiry:

(a) Immigrant inspectors, including persons designated immigrant inspectors by § 60.27;

(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. * * *

Section 34.13 of Title 42, Public Health, of the Code of Federal Regulations (Supp. 1947) provides for the convening of a board of medical officers to re-examine an alien—

(a) * * * (2) Upon an appeal by the alien from a certificate of insanity or mental defect, issued at a port of entry.

* * * * * * * *

(c) Re-examination shall include:

(1) A medical examination by the board;

(2) A review of all records submitted;

(3) Use of any laboratory or diagnostic methods or tests deemed advisable; and

(4) Consideration of statements regarding the alien's physical or mental condition made by a reputable physician after his examination of the alien.

* * * * * * * *

(e) * * * an alien who has appealed from a certificate of insanity or mental defect shall be permitted to introduce at least one expert medical witness. * * *

* * * * * * * *

(g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.

(h) The board shall report its findings and conclusions to the Immigration Service, and shall also give prompt notice thereof to the alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers.

## STATEMENT

Petitioner, an unmarried woman, thirty-three years of age, a native and citizen of Sweden, arrived at the port of New York on the *S.S. Stockholm* on March 1, 1948 (R. 11). She applied for admission to the United States as a quota immigrant (R. 12, 20). On March 11, 1948, she was examined by two medical officers who issued a medical certificate certifying that she had been examined and found to be "Mental Defective, Class 'A' " (R. 13, 22).[1] On March 16, 1948, petitioner appeared before a board of special inquiry con-

[1] In addition to the examination by the medical officers, they had before them a statement by the ships' doctor of the *Stockholm*, who reported, *inter alia*, "the impression of an incipient psychosis" in petitioner and referred to her transfer during the voyage to the isolation ward of the ship's hospital (R. 23-25).

sisting of Inspectors Clark (chairman) and Danielson and Secretary A. P. Fairbanks (R. 10). She was advised of the issuance of the medical certificate and told (R. 14) that it

> * * * renders you mandatorily excludable in so far as this board is concerned, from which exclusion there is no appeal. However, you may appeal from the certificate issued by the Public Health Service to a medical board to be convened by the Public Health Service at which time you may be represented by a physician of your own selection to give testimony in your behalf.

Petitioner indicated that she did wish so to appeal, and the board of special inquiry deferred its proceedings pending appeal to a medical board (R. 14). The board of medical officers convened March 25, 1948, and petitioner was there represented by Dr. Carlton Simon, a medical witness of her choosing who testified in her behalf, and a record was made of the entire proceedings (R. 26-32). The following day, March 26, 1948, the board of medical officers reported that it had

> * * * considered the appeal * * * and after taking into consideration the certificate of March 11, 1948, and the testimony given by Dr. Carlton Simon, * * * it concurs with the * * * [medical] certificate. (R. 26.)

Thereafter, on April 6, 1948, the board of special inquiry reconvened, and the records of the pre-

vious meeting were incorporated into the record (R. 15).[2] Petitioner, who was represented by counsel, was advised that the affirmance of the medical certificate by the board of medical officers rendered her "mandatorily excludable from the United States from which exclusion there is no appeal" (R. 17). Petitioner's counsel requested an opportunity to adduce further medical testimony of private psychiatrists and to furnish reports of Swedish physicians who may have examined petitioner prior to her departure for the United States (R. 18-19). The board of special inquiry, without foreclosing petitioner from presenting such reports (see R. 19), entered findings to the effect that her application for admission was regular except for the mental defect referred to in the medical certificate, by which she was certified by the medical board as "Mental Defective, Class A." It was therefore concluded that she was inadmissible to the United States under section 3 of the Immigration Act of February 5, 1917, and her exclusion was voted by the board. (R. 19-21.)

A petition for a writ of habeas corpus was filed on petitioner's behalf in the District Court for the Southern District of New York on April 21, 1948 (R. 3). It was alleged that the certificate of the board of medical officers finding petitioner to be

[2] Inspector Mintzer, who replaced Inspector Danielson at this hearing, stated that he had familiarized himself with the record in the case (R. 15).

mentally defective was erroneous and should not have been given conclusive effect by the board of special inquiry in rendering its nonappealable exclusion order. (R. 5-6.) A writ issued (R. 2) and respondent filed a return denying the legal sufficiency of the petition (R. 7-9). After a hearing, the district court, on June 10, 1948, discharged the writ and remanded petitioner (R. 32).

Petitioner's original attorney was meanwhile succeeded by another who applied to the district court on June 18, 1948, for reargument, principally on the following allegations of error: the board of special inquiry was in error in its position that it had no power to make an independent finding as to petitioner's mental condition; the board of special inquiry was improperly constituted in that its members did not qualify under Sections 5(c), 7 and 11 of the Administrative Procedure Act; the findings of the board of medical officers and the board of special inquiry were not based upon substantial evidence and were arbitrary and capricious; the medical certificate was not sufficiently explicit as to the nature of the mental defect of petitioner; the record did not show the qualifications of the examining physicians; and petitioner did not have the assistance of an interpreter in the physical examination[3] (R. 34-40). Reargument was allowed, but the court adhered to its original decision. The court held that the board of special inquiry acted in

[3] The last of these contentions is no longer pressed.

accordance with Section 17 of the Immigration Act of 1917 in relying upon the medical certificate; that, since boards of special inquiry are "specially provided for by or designated pursuant to statute" (quoting from 5 U. S. C. 1006, *supra*, pp. 5-6), they are excepted from the provisions of Section 11 of the Administrative Procedure Act (5 U. S. C. 1010, *supra*, p. 6) pertaining to the selection of hearing examiners; and that the presumption of regularity in the conduct of official business preserves the validity of the certificate in the absence of an affirmative showing that the examining doctors were not properly qualified. (R. 41-45.)

In affirming the order of the district court, the Court of Appeals, one judge dissenting, held that the medical board's conclusion was binding on the board of special inquiry under the language of Section 17 of the Immigration Act and its legislative history; that the district court properly held that a board of special inquiry need not be constituted in accordance with the provisions of Section 11 of the Administrative Procedure Act; and that the hearing before the medical board was fair (R. 51-58). The dissenting judge agreed with these propositions of law, but was troubled by "the stark and unadorned form of medical certificate." He found the certificate "defectively general" and objected that there was no compliance with the provision of 42 C. F. R. (Supp. 1947) 34.13(h), *supra*, p. 8, that the board's report "shall spe-

cifically affirm, modify, or reject the findings and conclusions of prior examining medical officers."

## ARGUMENT

1. Petitioner argues that it was error on the part of the board of special inquiry to consider itself bound as to medical matters by the medical certificate of the examining medical officers as concurred in on appeal by the board of medical officers, and to reject the evidence offered by petitioner to show her sanity (Pet. 8, *et seq.*). Petitioner urges not only that the decision below sustaining this view is based on an erroneous interpretation of the applicable statute, but that it is in conflict with decisions in other circuits.

We believe that the courts below correctly construed the applicable portions of Sections 16 and 17 of the Immigration Act of 1917 (*supra*, pp. 3-4) as requiring the board of special inquiry to accept as binding the medical findings. Without restating that which has already been developed in some detail in the majority opinion below (R. 53-56),[4] we feel that it is sufficient to emphasize that the change made in Section 17 of the 1917 statute,[5]

---

[4] With full concurrence on this point by the dissenting judge (see R. 58, 59).

[5] The pertinent portion of Section 17 (*supra*, p. 4) reads: "The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected * * * with any mental or physical disability which would bring such

when read with the comment of the Senate committee which recommended the change (see R. 55), can mean only that Congress intended the medical boards to have final authority on medical matters. As the court below said (R. 55):

> What else can be meant by the words [of the Senate Committee]: "on medical questions the opinions of doctors as against that of laymen should prevail."

But petitioner argues that, no matter what is the proper interpretation of the statute in regard to the finality of the decision of the medical board, nevertheless the cases dealing with this subject suggest a conflict among the lower courts. We submit, however, that the asserted conflict is more apparent than real. Petitioner bases her contention on the following cases: *Gee Shew Hong* v. *Nagle*, 18 F. 2d 248 (C. A. 9); *United States ex rel. Fink* v. *Tod*, 1 F. 2d 246 (C. A. 2), certiorari granted, 266 U. S. 599, reversed on confession of error by the Solicitor General, 267 U. S. 571; *Billings* v. *Sitner*, 228 Fed. 315 (C. A. 1); *Ex parte Liang Buck Chew*, 296 Fed. 182 (D. Mass.); *Ex parte Joyce*, 212 Fed. 282 (D. Mass.).

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aliens within any of the classes excluded from admission to the United States under section three of this Act."

The precursor of this provision in Section 10 of the 1907 Act (Act of February 20, 1907, 34 Stat. 898, 901) read: "the decision of the board of special inquiry * * * based upon the certificate of the examining medical officer, shall be final," etc.

Two of these cases (*Billings* v. *Sitner* and *Ex parte Joyce*) were decided under the 1907 statute (see fn. 5). And the very purpose of the change made in Section 17 of the 1917 act, according to the report of the Senate committee recommending the change (R. 55), was to

> * * * clarify its meaning and meet recent court decisions tending to modify the principle * * * that on medical questions the opinions of doctors as against that of laymen should prevail.[6]

No more express congressional overruling of judicial decisions could be found than is contained in the above language.

Despite the congressional rejection of these two pre-1917 decisions, in 1923 the Massachusett district court adhered to the discarded doctrine in *Ex parte Liang Buck Chew*, *supra*, but the court in that case made no reference to the Senate committee report referred to above. We contend with the court below (see R. 55-56) that the *Liang Buck Chew* decision must be disregarded because it was based upon a misconception of the import of the 1917 amendment.

*United States ex rel. Fink* v. *Tod*, *supra*, decided by the court below in 1924, is in accord with its decision in the instant case. Petitioner contends

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[6] The court below said that "it seems clear" that "the recent court decisions" referred to were those in the *Billings* and the *Joyce* cases (R. 55).

however, that when the judgment of the Second Circuit in the *Fink* case was reversed by this Court upon the Government's confession of error after the granting of certiorari, the ruling of the Court of Appeals as to the conclusiveness of the medical findings was also upset. There is, however, no evidence available as to the reasons for the confession of error,[7] so we must agree with the court below that (R. 56-57)—

> The contention * * * is without merit. We have no reason to regard a reversal on confession of error as indicating any decision on the merits by the appellate court.

Finally, petitioner relies for a conflict upon the decision of the Ninth Circuit in *Gee Shew Hong* v. *Nagle*, *supra*. In that case the alien seeking admission was originally found to be free of physical and mental defects. That fact was certified by the medical examiners to the board of special inquiry. Thereafter, for some reason not disclosed by the record, the case was referred back to the medical officers for a further physical examination. The alien was then found to be afflicted with a loathsome or dangerous contagious disease. Upon that certification he was denied admission by the board of special inquiry. The alien challenged his exclusion on

[7] Search of available sources has failed to reveal the reason for the confession of error, which was apparently made orally, and which may have been based upon considerations other than the legal issue here involved. See also Pet. 19.

the ground that the first certificate was final and conclusive and that the second examination and certificate were unauthorized. In rejecting that contention, the court did use some language supporting petitioner's argument here; nevertheless, all the language useful to petitioner was dictum. That was not a case in which the board of special inquiry exercised an independent lay judgment on medical matters, overruling the medical opinion expressed in the medical certificate. Rather, it was a case which was reopened upon the initiative of officials of the Immigration and Naturalization Service, asking a reexamination, but who made no attempt to supersede the medical decision with a lay opinion. This same procedure is open to the Service at the present time under the Immigration and Naturalization Service regulations (8 C. F. R., Supp. 1947, §§ 90.10, 90.11, 136.5 and 136.6),[8] which provide specifically for the reopening of a hearing in specified circumstances either before or after the issuance of a final order. We do not conceive that a reversal by the medical officers themselves of their original decision indicates in any way that lay opinion can or should be allowed to supersede medical judgment on purely medical matters.[9]

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[8] See also 42 C.F.R., 1947 Supp., 34.13(a)(1) and 34.13(i).

[9] It is interesting to note, too, that *Gee Shew Hong* v. *Nagle* has never been cited with approval in a reported decision. Its only citation discovered to date is in the instant case in which the dictum was correctly, we believe, disapproved (R. 57).

2. Petitioner contends (Pet. 24-27) that "it was rror on the part of the board of special inquiry nd of the courts below to use as basis for petiioner's exclusion a medical report so vague, inefinite, and perfunctory, that it did not show the ature of petitioner's purported affliction nor the ualifications of the examining physicians, that it as based exclusively upon the insufficient evidence f the hearsay report of the Swedish ship's doctor" (Pet. 24).

The last two aspects of this contention do not equire extended discussion. In respect of the bsence of statements on the face of the medical ertificate showing the qualifications of the examning medical officers, we find no evidence presented y petitioner that they were not qualified in acordance with Section 16 of the statute (*supra*, p. ), nor do we find any requirement in the statte or the regulations governing the examination hat such information be included in the certificate. 'etitioner, although represented by counsel at the econd hearing before the board of special inquiry fter her appeal to the medical board (see pp. 9-10, *upra*), did not raise any such issue.

As to the report of the ship's doctor, we believe he court below was clearly correct in holding that t was for the medical officers to determine what veight should be attached to it (R. 57-58).

Petitioner's criticism that the medical report did ot show the nature of her affliction we believe to be

equally groundless. This matter was not discussed in the majority opinion below, though the contention must have been considered and rejected, since the dissent is based solely upon "the stark and unadorned form of medical certificate" (R. 58), which the dissenting judge thought was an insufficient compliance with the regulations, even though it may not have violated the statutory requirement.

In the first place, there is no indication whatever that petitioner was prejudiced by any lack of information as to the nature of the mental defect found by the medical officers or that she failed to understand what the defect was. No such deficiency in the medical certificate or the report of the medical board was urged before the board of special inquiry. The point was first made in the affidavit of petitioner's new counsel in support of her application for reargument in the district court (see p. 11, *supra*). Petitioner does not claim prejudice, but bases her complaint upon mere formal insufficiency by way of technical non-compliance with the regulations.

The regulations governing the medical examination of aliens are found in 42 C. F. R. Supp. 1947, part 34. Section 34.2(c) defines the medical certificate as—

> A document issued by an examining medical officer to the Immigration Service, signed by him and certifying his findings with respect to an alien's physical and mental condition.

And in Section 34.7 provision is made for the issuance of a Class A certificate in respect of any alien who is found to be afflicted with any of the following diseases or defects:

> (a) Tuberculosis in any form;
>
> (b) A loathsome or dangerous contagious disease;
>
> (c) Idiocy, imbecility, feeblemindedness, epilepsy, insanity, chronic alcoholism, or constitutional psycopathic inferiority;
>
> (d) A mental defect not enumerated in paragraph (c) of this section; * * *

The medical certificate issued by the original examining officers in reporting that petitioner had been examined and found to be a mental defective, and was therefore in Class A, was a satisfactory compliance with these provisions.

Section 34.13 of these regulations outlines the procedure governing the reexamination of an alien before a board of medical officers either upon the request of the Immigration Service or upon an appeal by an alien from a certificate of insanity or mental defect (42 C. F. R., Supp. 1947, 34.13(a)(1) and (2)). It was the question whether the further steps in that appeal procedure were satisfactorily complied with that troubled the dissenting judge, and his views are now adopted by petitioner. The dissenting judge thought, erroneously we believe,

that the report made by the Board of medical officers did not comply with subsections (g) and (h) of Section 34.13, *supra*, p. 8.

In the reexamination of petitioner by the medical board (R. 26-32) she was represented by a medical witness of her choosing, and both the witness and petitioner were carefully examined by the members of the board. The entire proceeding was included verbatim in the report of the board, as required by subsection (g), the findings and conclusions being specifically stated to have been based upon the previous certificate, the appeal proceedings, and the testimony of petitioner's witness. As required by subsection (h), the findings and conclusions were reported to the Immigration Service, and petitioner was likewise informed of the result at the board of special inquiry, if not before. The board's report did "specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers" (subsection (h)), as follows:

> Pursuant to the request of the District Director of Immigration and the order of the Medical Officer in Charge, the following Board of Medical Officers of the U. S. Public Health Service, has considered the appeal regarding subject named May Gunborg Johnson and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate.

Since we have already shown that the medical certificate need "find" nothing more than the fact that an alien is afflicted with a mental defect, we submit that the above statement of concurrence, based upon a verbatim reported account of unobjectionable proceedings, constituted compliance with the regulations.

3. Petitioner also asserts that the procedure before the board of special inquiry was fatally defective in the following respects: (a) in that the members of the board of special inquiry were not examiners appointed pursuant to Section 11 of the Administrative Procedure Act: (b) in that the composition of the board violates the separation of functions requirements of Section 5 (c) of that Act; and (c) in that one of the immigration inspectors who sat as a member of the board on March 16 was replaced by another inspector when the hearing resumed on April 6.

Sections 5, 7 and 8 of the Administrative Procedure Act are made applicable by Section 5 to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved * * * (3) proceedings in which decisions rest solely on inspections, tests, or elections". It is assumed that the requirement of the exclusion statute (8 U. S. C. 153) of a hearing before a board of special inquiry generally subjects the proceedings

before such a board to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act.[10]

(a) While petitioner now contends that the board of special inquiry in this case was invalidly constituted in that its members were not examiners appointed pursuant to Section 11 of the Administrative Procedure Act (Pet. pp. 28-33), she specifically conceded in her brief in the court below that Section 11 was not applicable to boards of special inquiry.[11] Petitioner may not attack in this Court the judgment of the court below on grounds which were not presented to that court. In any event, the decision of the District Court on this issue was clearly correct.

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[10] *U. S. ex rel. Lindenau* v. *Watkins*, 73 F. Supp. 216 (S.D. N.Y.), reversed on other grounds, 164 F. 2d 457 (C.A. 2), *U. S. ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C.A. 3), and *Eisler* v. *Clark*, 77 F. Supp. 610 (D. D.C.), cited by petitioner, all deal with the application of the Administrative Procedure Act to deportation proceedings, and have no bearing on the application of that Act to exclusion proceedings.

[11] In the petitioner's brief in the court below, the following statement appears (Relator-Appellant's Brief, p. 37): "The relator herein agrees that pursuant to Judge Rifkind's holding the Immigration Service may be exempt with respect to hearings before boards of special inquiry from the requirement that independent examiners pursuant to section 11 of the Act have to compose the board. As the statute provided in 8 U.S.C.A. 153 that the board members may be selected from immigration officials, no objection is made to this board on the ground that immigration officials and employees were acting as board members."

Section 7 (a) of the Administrative Procedure Act prescribes who shall preside over hearings governed by the Act, as follows:

> PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.

It is our contention that boards of special inquiry fall squarely within the saving exception for "boards * * * specially provided for by or designated pursuant to statute." The exclusion statute (8 U. S. C. 153) specifically provides that:

> Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards.

Here we have not merely an authorization to appoint to boards of special inquiry such immigration officials as may be designated by the Commissioner, but a statutory command that the boards be so constituted. Clearly, therefore, boards of special inquiry are "boards specially provided for by or designated pursuant to" the exclusion statute, within the meaning of Section 7(a), and, therefore, need not be composed of examiners appointed in accordance with Section 11 of the Administrative Procedure Act.[13]

Petitioner further objects to the fact that A. P. Fairbanks, who acted as secretary to the board of special inquiry, also sat as a member of the Board, on the ground that she does not possess such competence as to bring her within the spirit of the exception of Section 7(a) for special statutory hearing officers. It is well established that her designation as a member of the board of special inquiry was authorized by the exclusion statute. *United States ex rel. Minuto* v. *Reimer*, 83 F. 2d 166, 167-168 (C. A. 2). Also, for all that appears in the record, Miss Fairbanks may have had extensive experience as a member of such boards, and, therefore, may be better qualified to so act than some immigrant inspectors. Again, if we are correct in

[13] This has been the consistent view of the Immigration and Naturalization Service. See statement of former Commissioner Carusi in *The Federal Administrative Procedure Act and the Administrative Agencies* (1947), p. 292. See also Note, 49 Col. L. R. 73, 78-80 (1949).

our view that the finding of the medical board was binding upon the board of special inquiry, then the latter in this case had no real function to perform, since the sole ground for petitioner's exclusion was medical, and petitioner could in no way be prejudiced by the composition of the board of special inquiry. Finally, as we point out later, where the exclusion of an alien is based solely upon medical grounds, the decision would seem to rest solely on inspections or tests within the meaning of the introductory clause of Section 5 which excepts from all of the provisions of Sections 5, 7 and 8 "proceedings in which decisions rest solely on inspections, tests, or elections". In such a case, therefore, the composition of the board of special inquiry is in no way governed by Section 7.

(b) Petitioner contends that the composition of the board of special inquiry violates the separation of functions requirements of Section 5 (c) of the Administrative Procedure Act, in that the members of the board are "responsible to and subject to the supervision and direction of their superiors in the Service, their officers, employees and agents who are engaged in the performance of the investigating and prosecuting functions of the Service" (Pet. p. 36). It is our contention that Section 5 (c) has no application to exclusion proceedings generally. This follows from the exception from the requirements of Section 5 (c), contained in the last sentence of that subsection, of proceedings

"determining applications for initial licenses." The term "license" is defined in Section 2 (e) as including "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." Seeking to enter the United States clearly involves an application for a "license" within the broad and functional definition of Section 2 (e). The phrase "determining applications for initial licenses" as used in the last sentence of Section 5(c) refers to the grant or denial of an application for a license, as opposed to such matters as the revocation or suspension of licenses.[13] Accordingly, it is believed that the proceedings of boards of special inquiry in determining whether aliens are entitled to be admitted into the United States involve the determination of "applications for initial licenses", and are therefore not subject to the requirements of Section 5 (c).[14]

As a separate matter, it should be noted that in this, as in many exclusion cases, the sole basis of exclusion is on medical grounds. The introductory

[13] The rationale of this exception for proceedings "determining applications for initial licenses" is discussed in *The Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 50-53.

[14] This is the contemporaneous and consistent interpretation of Section 5 (c) by the Immigration and Naturalization Service. See statement of former Commissioner Carusi in *The Federal Administrative Procedure Act and The Administrative Agencies* (1947), p. 292.

clause of Section 5 of the Administrative Procedure Act excepts from the requirements of that section (and therefore from the requirements of Sections 7 and 8) "(3) proceedings in which decisions rest solely on inspections, tests, or elections."[15] Where, as in this case, the sole basis for exclusion is medical, the determination of the alien's mental condition is made by the Public Health doctors and by the alien's doctor on the basis of a medical examination of the alien. The subsequent hearing before the board of special inquiry is, as in this case, a pure formality (R. 15-21) since there were no non-medical grounds for exclusion, because the finding of the medical board is binding and conclusive upon the board of special inquiry (*supra*, pp. 13-17). Thus, where, as here, an alien is excluded solely upon medical grounds, the decision must be deemed to rest solely on inspections or tests, with the result that the proceedings in such exclusion cases are not subject to the provision of Sections 5, 7 and 8 of the Administrative Procedure Act.[16]

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[15] For the genesis and rationale of this exception, see the *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 37; for the legislative history and for other examples, see *The Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 44-45.

[16] It may also be noted that even if Section 5 (c) were applicable to exclusion proceedings, the separation of functions requirements of that subsection are to be deemed modified to the extent that some other statute, within the exception of

c) Petitioner's final contention that the proceedings before the board of special inquiry violated the Administrative Procedure Act is to the effect that the substitution of Inspector Mintzer for Inspector Danielson at the second hearing before the board, contravened the requirement of Section 5 (c)[1] that "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency." The non-applicability of the requirements of Section 5(c) to this proceeding has previously been urged on several grounds. It remains only to point out that the substitution of Mintzer for Danielson arose out of the continuance of the board hearing from March 16 to April 6, 1948. The record specifically shows that the hearing was continued for the sole purpose of enabling petitioner to appeal to the medical board (R. 14). We believe that petitioner is not in a position to complain of a substitution resulting from a continuance of the board hearing for the purpose of enabling petitioner to pursue her only effective remedy on the medical issue. As noted above, the substitution could not have prejudiced petitioner since the finding of the medical board on the medical issue was conclusive upon the board of special inquiry.

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[1] Section 7 (a), requires that the hearing be conducted by certain officers who are under the supervision and control of persons exercising investigative or prosecuting functions.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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